

MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

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**COMPLETE TITLE OF CASE**

STATE OF MISSOURI,

Respondent,

v.

DAVID CARL McCLAIN,

Appellant.

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**DOCKET NUMBER WD70253**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** January 19, 2010

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**Appeal from**

The Circuit Court of Boone County, Missouri  
The Honorable Jodie C. Asel, Judge

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**APPELLATE JUDGES**

Division Three: James Edward Welsh, P.J., and Mark D. Pfeiffer and Karen King Mitchell, JJ.

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**ATTORNEYS**

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Jefferson City, MO

Attorneys for Respondent,

Matthew Ward, Assistant State Public Defender  
Columbia, MO

Attorney for Appellant.

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# MISSOURI APPELLATE COURT OPINION SUMMARY

## MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, )  
)  
Respondent, )  
v. )  
)  
DAVID CARL McCLAIN, )  
)  
Appellant. )

WD70253

Boone County Circuit Court

Before Division Three Judges: James Edward Welsh, P.J., and Mark D. Pfeiffer and Karen King Mitchell, JJ.

David McClain (McClain) appeals the trial court's judgment convicting him of one count of the class C felony of possession of a controlled substance in violation of section 195.202. On appeal, he presents one point in which he claims that the trial court erred in overruling his motion for acquittal on the possession charge because the State failed to establish an element of its *prima facie* case: that the marijuana weighed over 35 grams.

### REVERSED AND REMANDED.

#### Division Three holds:

In this case, through his cross-examination of the State's expert witness criminalist, McClain did elicit testimonial evidence that there were, at least, a few stems mixed with the marijuana. Having presented this evidence, McClain carried his burden to present evidence that there were non-controlled substances mixed with the marijuana. At that point, it became the State's burden to establish that the non-controlled substances did not reduce the weight of the controlled substance below 35 grams.

In this case, the State never elicited any testimony from its criminalist regarding the weight of the non-controlled substances that were mixed with the marijuana or the weight of the marijuana without the non-controlled substances. Furthermore, we do not believe that it was reasonable for the jury to infer that the marijuana without the stems would have weighed at least 35 grams. The trial court erred in overruling McClain's motion for a judgment of acquittal on the one count of the class C felony of possession.

Even though the State failed to prove that McClain possessed more than 35 grams of marijuana, it did prove that he was guilty of the lesser-included crime of the class A misdemeanor of possession. The trial court's judgment convicting McClain of the class C felony of possession of more than 35 grams of marijuana is reversed, and judgment is entered against McClain on the class A misdemeanor of possession of marijuana. The case is remanded back to the trial court to conduct sentencing for the class A misdemeanor of possession of marijuana.

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